Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1976

No. 76-65

REPUBLICAN PARTY OF
SHELBY COUNTY, TENNESSEE,
Appellant,

VS.

ROSCOE DIXON, WILLIAM OWENS, CLYM CROSS, LILA CROSS, PATRICIA MAYWEATHER, and RONALD K. HOOKS, Individually on behalf of themselves and all other resident citizens and qualified electors of the State of Tennessee, and SHIRLEY HASSLER, Coordinator of Elections, ANN WELDON, JACK H. MORRIS, III, LEAH V. ABBOTT, PAT JOYNER, and WILLIAM L. AUSTIN, Shelby County Election Commissioners; and THE COMMITTEE FOR THE PRESERVATION OF THE SEVENTH CONGRESSIONAL DISTRICT,

Appellees.

On Direct Appeal from the United States Three-Judge District Court for the Western District of Tennessee, Western Division

MOTION TO AFFIRM AND BRIEF

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MOTION TO AFFIRM AND BRIEF

Appellees, Roscoe Dixon, William Owens, Clym Cross, Lila Cross, Patricia Mayweather, and Ronald K. Hooks, move the Court to affirm the judgment sought to be reviewed on appeal on the ground that the decision of

the District Court upon the evidence was correct and that the questions on which the decision of the cause depends are not so substantial as to need further argument.

Jerome M. Hoffman
Leonard V. Hughes, Jr.
Attorneys for Appellees

STATEMENT OF THE CASE

The Tennessee General Assembly in 1972 enacted Tennessee Code Annotated, Sec. 2-1603 which provided for the redistricting of Tennessee's Eight Congressional Districts based upon the 1970 Decennial Census. The Congressional Elections of 1972 in Tennessee were held pursuant to that Statute. In July, 1974, individual Appellees, Roscoe Dixon, **et al.** sought an injunction in the District Court against the enforcement of the Statute and also a Declaratory Judgment that said districts were unconstitutionally apportioned and should be altered by the Court. The District Court refused to grant injunctive relief at that time since the 1974 Congressional Election process had begun, however, in a per curiam opinion on December 26, 1974, the Court held that based upon 1970 census population figures to which the parties had stipulated, the Sixth and Eighth Congressional Districts of **Tennessee were constitutionally malapportioned.** The Court deferred any action on its opinion in order to afford the Tennessee General Assembly the opportunity to study, investigate, and act, as appropriate, with re-

spect to any necessary redistricting. The Tennessee General Assembly in 1975 considered the redistricting issue but did not amend the Congressional Redistricting Statute.

Appellees, Roscoe Dixon, **et al.**, Plaintiffs in the District Court in July, 1975, moved for supplementary relief based upon the Declaratory Judgment and subsequently Appellant intervened. Appellees moved the Court to reapportion the Sixth, Seventh and Eighth Congressional districts of Tennessee in accordance with House Bill 1100 which passed the Tennessee House and its counterpart, Senate Bill 734, which failed by three votes in the Tennesssee Senate. Appellant urged the District Court to consider 1974 population estimates contending that any malapportionment which may have existed between the Sixth and Eighth Districts had been cured and changed by population shifts in the intervening period. It also proposed a plan rearranging the Sixth, Seventh and Eighth Congressional Districts based upon 1974 population estimates. The tract estimates upon which Appellant relied were made for each census tract in Shelby County, Tennessee by the National Planning Data Corporation and published on March 21, 1975, in the Department of Commerce News, C.B. 75-64. Since the entire Eighth and portions of the Sixth and Seventh Congressional Districts are within the county, census tract population was necessitated by reason of sub-county district lines. An explanation of the estimates was published in June of the same year by the Department

of Commerce, Bureau of Census (Series P-25, No. 587). The evaluation by the Bureau of Census indicated that while the "level of accuracy suggested by these averages is quite good . . . the coefficient of variation is in the neighborhood of 10 percent." Dr. Pursell who testified for Appellees likewise indicated that the average error is about 10 percent since the estimates were being made on a sub-county basis. Dr. Pursell further testified that the particular estimates made by the National Planning Data Corporation are statistically weak, often estimates based upon other estimates, and none of their estimates can be tested, since it refused to produce its basic equation by which it arrived at the estimates to test their accuracy. Even Appellant's expert, Mr. Francese, testified that the Bureau of the Census in purchasing the estimates did not adopt them or make any statement as to their validity or accuracy. He further testified that accurate sub-county estimates are very difficult because the necessary indicators to obtain accuracy are not available.

The opinion of the District Court of March 25, 1976, determined that it was not confined to 1970 Census figures and could consider 1974 estimates. The Court found, however, there was not presented clear, cogent and convincing proof that the 1970 Federal Census figures are not the best evidence of current populations of these districts. The Court further found that the proof necessary to establish the "provisional estimates" of the Bu-

reau of Census as the best evidence of such populations did not meet the standard required. Consistent with its previous holding of constitutional malapportionment, the Court further held that the Sixth, Seventh and Eighth Congressional Districts should be altered by returning those wards and precincts of Shelby County, Tennessee from the Eighth to the Sixth and Seventh Congressional Districts, respectively, from which they had come and had fallen into the Eighth District by the inadvertent action of the General Assembly when it enacted Tennessee Code Annotated, Sec. 2-1603 in April, 1972. The result was to make the populations of the three districts almost equal according to the 1970 Census as interpolated to which the parties had previously stipulated.

BRIEF FOR THE APPELLEES

OPINION BELOW

The Opinion of the Court entered on March 25, 1976, is now reported. **Dixon v. Hassler,** 412 F. Supp. 1036 (W.D. Tenn. 1976).

JURISDICTION

Jurisdiction to consider the appeal is admitted.

STATUTE INVOLVED

The Statute copied by Appellant in its Jurisdictional Statement is the one involved in this appeal. Jurisdictional Statement of Appellant at 3, 4, 5.

QUESTIONS PRESENTED BY THE APPEAL

1. Having determined that Tennessee's Congressional Districting Statute was unconstitutional, was the District Court, as a matter of law in fashioning a remedy in 1976, confined to the 1970 Decennial Census population figures?

2. Are "provisional estimates" published by the Bureau of Census compiled at the sub-county level highly accurate so they may be used in fashioning Congressional district lines within a county?

3. Was the evidence adduced in the District Court clear, cogent and convincing that the Decennial Census figures are no longer valid with respect to the sub-county census tracts?

4. Did the evedence adduced in the District Court indicate that the sub-county population estimates had a high degree of accuracy and were thoroughly documented?

ARGUMENT

Most Courts have been hesitant to use population figures other than those of the Decennial Census and some have held they may not, as a matter of law. **Grills v. Braningin,** 284 F. Supp. 176 (S.D. Ind) **aff'd. sub. nom. Branigin v. Duddleston,** 391 U.S. 364 (1968); **Chavis v. Whitcomb,** 307 F. Supp. 1362 (S.D. Ind. 1969); **Klahr v. Goddard,** 250 F. Supp. (D. Ariz. 1966);

Maryland Citizens Committee for Fair Congressional Redistricting v. Tawes,, 253 F. Supp. 731 (D. Md.); **aff'd** 384 U.S. 315 (1966). The **Klahr** and **Tawes** cases present situations very similar, if not identical, to the one at bar since the proposed estimates were found not to be sufficiently certain and accurate to warrant use by the Court. It has been pointed out that the real danger in the use of other than Decennial Census figures appears when they become subject to challenge before each Congressional Election. **Priesler v. Secretary of State of Missouri,** 279 F. Supp. 952, 1003 (1967), **aff'd sub. nom. Kirkpatrick v. Preisler,** 394 U.S. 526 (1969). This, no doubt, might well produce a deluge of such litigation resulting in the erosion of the presumptive correctness of the Decennial Census and the political stability for which it was adopted. (279 F. Supp. 1002, 1003, 1004). There is, perhaps, much to be said for the position of those Courts which have chosen not to now enter into a "mathematical thicket". 253 F. Supp. at 734. Several of those District Courts which have dealt with the problem of using population figures other than those of the Decennial Census have returned to the reason for its inclusion in the Constitution. **Priesler v. Secretary of State of Missouri,, supra.** The Decennial Census was clearly part of the Great Compromise which ended the stalemate between the Founding Fathers at the Constitutional Convention of 1787. 3 **The Records of the Federal Convention of 1787** (Farrand ed. 1911) at 551. Such a periodic census was the proposal of Edmund

Randolph whose resolution basing future apportionments squarely on numbers and deleting any reference to wealth was overwhelmingly adopted. 1 Farrand, at 580, 606. It is significant to note that this Court often returns to that fundamental source when the question necessitates an answer within the historical context.

Wesberry v. Sanders, 376 U.S. 1 (1964). Both the majority and dissenting opinions in **Wesberry** v. **Sanders, supra,** discussed the intent of the Framers wherein this Court applied the rule of **Baker v. Carr,** 369 U.S. 186 (1962) to congressional apportionment. 376 U.S. at 17, 18, 30. In his dissent Justice Harlan pointed out that in all of the discussions surrounding the basis of representation of the House, there is nothing which suggests even remotely that the delegates had in mind the problem of districting within a state. 376 U.S. at 31, 32. It is submitted, **a fortiori,** that population estimates based upon sophisticated demographic formulae never entered the minds of our Fathers whose thoughts were directed to more fundamental and basic considerations.

While the Courts have had to consider the population estimate problem during the interim between each Decennial Census, the Congress after almost two hundred years of this republic has now taken action on legislation authorizing a mid-decade census. H.R. 11337, 94th Cong., 2d Sess.,, 122 Cong. Rec. H. 2998; S. 16559 (1976). This legislation enacted by both Houses in substantially the same form contains the following provision,

> Information obtained in any mid-decade census shall not be used for apportionment of Representatives in Congress among the several States, nor may such information be admitted as evidence or used for any purpose, except as otherwise provided in this subsection, in any action, suit, or other judicial proceeding in which the constitutionality of a State's congressional redistricting plan is at issue. If a State creates a congressional redistricting plan which is based upon any mid-decade census, this subsection shall not apply to prohibit the admission as evidence, or other use, of such information in any judicial proceeding in which the validity of such plan is at issue. H.R. 11337, 94th Cong., 2d Sess. Sec. 5 (1976).

While there have been legislative efforts to establish a mid-decade census during the last fourteen years in Congress, apparently the near-unanimous support from business and industry, users of statistical data, State and local governments and the Bureau of the Census has finally had its effect. Hearings on H.R. 2556 and H.R. 3704 Before a Subcomm. of the House Comm. on Post Office and Civil Service, 94 Cong., 1st Sess. 1 (1975). It is submitted that this legislation, if enacted, will to a great extent solve the problems regarding the use of population estimates between each Decennial Census.

The opinion of the District Court below concluded that estimates could be considered as a matter of law.

Jurisdictional Statement of Appellant, App. A at 10. It is submitted that this holding is farther than any District Court or this Court has been willing to go in undertaking the function of reapportionment. While Courts have permitted State Legislatures to use census estimates which qualify, no Court has been willing to undertake the legislative function of apportionment itself using other than Decennial Census population figures as a base. **Exon v. Tiemann,** 279 F. Supp. 603 (D. Neb. 1967); **Wells v. Rockefeller,** 389 U.S. 421 (1967(. Even in **Kirkpatrick v. Preisler, supra,** this Court was setting standards for the State Legislatures to follow in fashioning Congressional Redistricting plans. 394 U.S. at 535.

The evidence as to the accuracy of the use of the "provisional estimates" primarily consisted of the depositions of two experts, Dr. Donald E. Pursell and Peter K. Francese. (R. Doc. 66; 67). In its Jurisdictional Statement Appellant asserted,

> Although the expert testimony differed as to the estimates for individual precincts (which are building blocks for a redistricting plan), both experts agreed that the estimates for the entire Congressional District were accurate, and Mr. Francese stated that this accuracy was within one percent (1 percent). Jurisdictional Statement of Appellant at 20.

Appellees feel this statement is incorrect as to its con-

clusion of the testimony of Dr. Pursell and tends to mislead. First, Dr. Pursell indicated that the average error in Appellant's sub-county tract estimates is approximately ten (10) percent, whereas, the average error in county estimates would range between four and one-half (4 1-2) percent to six (6) percent depending on the size of the county. (R. Doc. 66 at 32). Dr. Pursell explained that while county estimates can be made with a higher degree of accuracy, Congressional District lines do not coincide with the county boundaries resulting in the problem in this case. (R. Doc. 66 at 83).

The difficulty in achieving accuracy is greatly increased in the use of population estimates on a sub-county level. The testimony of Appellant's expert indicated that it is very difficult since the necessary indicators to obtain proper estimates are not available. (R. Doc. 67 at 58, 65. He further testified that there is no method by which to test the accuracy of estimates unless a special census is taken. (R. Doc. 67 at 55, 61, 48). The testimony of Appellees' expert frankly admits that demographers have been unable to obtain a methodology to make sub-county estimates. (R. Doc. 66 at 12, 13, 55). He agrees that the indicators are not available, therefore, no sub-county estimate can be accurate. (R. Doc. 66 at 12, 13, 99). The Appellant through the testimony of its expert was unable to provide the documentation necessary as to the methodology and accuracy acceptable to those in the demographic field. (R. Doc 67 at 61, 88; Doc. 66 at 33, 34).

It was from this evidence that the District Court below found that the Appellant had not presented clear, cogent and convincing proof that the 1970 Federal census figures were not the best evidence of the current populations of these districts. Jurisdictional Statement of Appellant, App. A at 13. While Appellees may not agree with the opinion of the District Court below that estimates may be considered, they are convinced that the finding by the Court is overwhelmingly supported by the evidence and should be given the respect and weight to which it is entitled. **Best Medium Publishing Company v. National Insider, Inc.,** 385 F.2d 384 (7th Cir. 1967);**Aetna Casualty and Ins. Co. v. Hunt,** 486 F.2d 81 (10th Cir. 1973).

CONCLUSION

The decision of the District Court below based upon the evidence should be affirmed.

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CERTIFICATE OF SERVICE

I, LEONARD V. HUGHES, JR., one of the attorneys for Roscoe Dixon, William Owens, Clym Cross, Lila Cross, Patricia Mayweather, and Ronald K. Hooks, Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 29th day of September, 1976, I have served copies of the foregoing Motion and Brief on all counsel of record herein by depositing same in the United States Mail, first class, postage pre-paid.

LEONARD V. HUGHES, JR.